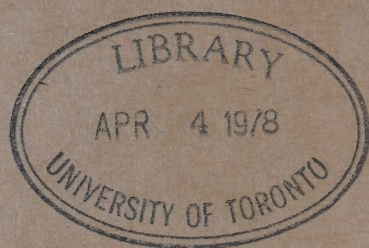


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# Gun Control: The Options\*

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## I Introduction

Gun control is one of those issues, like capital punishment and abortion, on which most people have strongly held views. The purpose of this paper is to analyse the competing interests involved to see whether further controls are necessary and, if so, whether controls can be devised which will help curtail the illegal and improper use of guns and yet not impose difficult obstacles on legitimate users.

Even if one personally dislikes the use of guns, it is difficult to argue that target shooting — an Olympic sport — is not a legitimate activity. Similarly, hunting is part of the Canadian tradition. In the preface to the *Hunter's Handbook*,<sup>1</sup> published by the Ontario Government, Leo Bernier, the Minister of Natural Resources states: "The sport of hunting ranks historically as one of our province's first recreational pursuits. Across many years, it has developed into a wholesome recreation in which the enjoyment comes more from the appreciation of nature and the satisfaction of handling guns skilfully than it does from getting a full bag."

## II The Pressure for Change

An attempt to find a proper balance between the interest of society in controlling the illegitimate use of guns and not un-

\* This study, which was completed the end of August, 1975, was prepared for the Ministry of the Solicitor General, Ottawa, but does not necessarily represent the views of the Ministry. The assistance of Arnold Herschorn, a second-year student in the Faculty of Law, is gratefully acknowledged. I am also indebted to the many persons who willingly supplied information on the present system of gun control as well as to those who commented on earlier drafts of this paper.

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<sup>1</sup> Part I, 1969, revised 1974. The preface also states that in Ontario "some 24,000 new hunters respond to this attraction every year, and the number of resident hunters is well above half a million".



duly hampering legitimate users was made in the omnibus Criminal Law Amendment Act of 1968-69.<sup>2</sup> How is it that there is strong pressure for changes in our gun control laws only half a dozen years after these substantial changes were made by the Government? The immediate cause of the pressure would seem to be a series of tragic incidents involving the death of a number of innocent persons. On January 21, 1975 in Montreal thirteen persons died of gunfire and arson at the Gargantua Club,<sup>3</sup> and on May 28, 1975 three persons died in a high school in Brampton, Ontario, when a teenager brought a rifle to school intending to kill two of his teachers.<sup>4</sup> Perhaps neither of these incidents would have been prevented by stricter laws; nevertheless, they provided the public with concrete examples of what can happen because of the availability of guns. Moreover, stricter gun laws have been advocated by the police<sup>5</sup> because of the great danger of an officer being killed by a firearm.<sup>6</sup> A number of well publicized cases occurred in 1973 and 1974, including the murders in Toronto of Constables Lothian<sup>7</sup> and Maitland<sup>8</sup> and the killing of two police officers outside Moncton, New Brunswick.<sup>9</sup>

<sup>2</sup> Stat. Can. 1968-69, c. 38, s. 6.

<sup>3</sup> See the *Globe and Mail*, January 22, 1975.

<sup>4</sup> See the *Globe and Mail*, May 29, 1975.

<sup>5</sup> See, e.g., The Annual Report by C. O. Bick, Chairman of the Metropolitan Toronto Board of Police Commissioners, *Globe and Mail*, January 24, 1975 (mandatory five-year sentence without parole for anyone convicted of a crime with a firearm); statement by Metropolitan Toronto Police Chief Harold Adamson, *Globe and Mail*, January 4, 1975 (control of the purchase of rifles).

<sup>6</sup> See generally, Newton and Zimring, *Firearms and Violence in American Life* (1969) (A Staff Report submitted to the National Commission on the Causes and Prevention of Violence) at p. 40: "firearms are virtually the only weapon used in killing police officers". In Canada during the period 1961-70 thirty-seven policemen were killed and in only two cases were firearms not used: see Jayewardene, "The Death Penalty and the Safety of Canadian Policemen" (1973) 15 *Can. J. of Crim. and Corrections* 356 at p. 358. In a thorough statistical study in the R.C.M.P. Gazette, Dalley, "Killed Canadian Policemen and their Killers" (1975) 37 *R.C.M.P. Gazette* 1, in which such variables as age of suspect and hour of occurrence are examined, there is no discussion of type of weapon used, presumably because it is assumed that it is almost invariably a gun. All nine Toronto policemen killed since 1900 were shot: see the *Toronto Star*, February 5, 1973. Although four of these nine Toronto killings were in a one-year period ending with Constable Maitland's death on February 1, 1973, this sudden increase has not been paralleled across Canada where the number of officers killed over the past ten years has remained relatively constant (e.g., 5 in 1973; 3 in 1972; 3 in 1971; 3 in 1970; 5 in 1969; 5 in 1968; 3 in 1967): see Dalley, *supra*.

<sup>7</sup> January 11, 1973: see the *Globe and Mail*, January 13, 1973.

<sup>8</sup> February 1, 1973: see the *Globe and Mail*, February 2, 1973.

<sup>9</sup> See the *Globe and Mail*, December 16, 1974.

Coupled with these dramatic events are fears that violent crime is rising in Canada and that if we are not careful we will have a gun-toting society similar to the United States. (In fact we now "tote" proportionately as many guns as the Americans do; the difference is that handguns constitute a much lower percentage of these.)<sup>10</sup>

The use of guns in crime is much more widespread in the United States than in Canada.<sup>11</sup> Further controls are being sought in the United States, and this drive has been reflected in Canada. The U.S. 1968 Gun Control Act,<sup>12</sup> quickly passed under the shadow of the shooting of Robert Kennedy, would seem to have had a very limited impact.<sup>13</sup> President Ford has announced that he will support stricter gun laws (although not Federal registration of firearms).<sup>14</sup>

A number of private members' bills have been introduced in Parliament. Bills by Senator Cameron<sup>15</sup> and Stuart Leggatt<sup>16</sup> were modelled on an earlier Bill introduced in 1972 by Warren Allmand,<sup>17</sup> the present Solicitor General. The provinces have also been putting some pressure on the Federal Government. George Kerr, the Ontario Solicitor General, has announced

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<sup>10</sup> Although the estimates vary, a good guess is that there are 100,000,000 firearms in the U.S. for their somewhat greater than 200,000,000 population, and 10,000,000 firearms for our somewhat greater than 20,000,000 population.

<sup>11</sup> Using only the homicide figures for 1973 it can be seen that in the U.S. the proportion of homicides with firearms is much higher than in Canada. In 1973 in the U.S., firearms were used in two-thirds of all homicides, whereas in Canada, firearms were used in under one-half of all cases. And, of course, there are many more such homicide cases in the U.S. than in Canada. Firearm homicides in the U.S. involved 6.2 killings per 100,000 compared with only about 1 per 100,000 in Canada. These figures were worked out from the statistics set out in Zimring, "Firearms and Federal Law: The Gun Control Act of 1968" (1975) 4 *J. of Legal Studies* 133 at p. 133, footnote 2, and Statistics Canada, *Causes of Death* (catalogue 84-203).

<sup>12</sup> S. 101, Pub. L. No. 90-618, 82 Stat. 1213.

<sup>13</sup> Zimring, *supra* footnote 11 at p. 135: "the potential impact of the Act is quite limited when measured against the problems it sought to alleviate". The main reason (at p. 191) is that "The Gun Control Act has not produced any measurable change in the migration of handguns from loose-control to tight-control jurisdictions".

<sup>14</sup> Message to Congress, June 19, 1975.

<sup>15</sup> S-14 introduced on October 29, 1974.

<sup>16</sup> C-392 introduced on June 4, 1975. See also Bill C-379 introduced by John Diefenbaker on February 19, 1975, which would impose a minimum five-year sentence on "every one who carries or has in his possession a firearm for the purpose of or while committing an indictable offence".

<sup>17</sup> C-36 introduced on February 25, 1972.



that he will introduce provincial legislation if the Federal Government does not introduce its own legislation.<sup>18</sup>

Moreover, the Press has been advocating stronger controls and public opinion is now backing such controls. A Gallup Poll reported in the *Toronto Star* on August 9, 1975 showed that, nationally, 83% of Canadians favour the registration of all firearms and 81% believe there should be a law to forbid possession of a pistol or revolver by a member of the general public. The table below shows the responses in the sample (1,039 adults) during the first week of July, 1975 to the following questions and compares them with a study conducted by the American Gallup Poll in March, 1975.

The questions were:

"Do you favour or oppose the registration of all firearms?"

"Here is a question about pistols and revolvers. Do you think there should or should not be a law which would forbid the possession of this type of gun except by the police and other authorized persons?"

The results were:

#### REGISTRATION OF

#### ALL FIREARMS

	CANADA	U.S.A.
Favour	83%	67%
Oppose	13	27
No opinion	4	6

#### POSSESSION OF

#### HANDGUNS

Should be a law forbidding

possession	81%	41%
Should not be	15	55
No opinion	4	4

Finally, gun control is tied in with the question of the abolition of capital punishment. If capital punishment is to be abolished, so the argument goes, we have to take steps to pro-

<sup>18</sup> See the *Globe and Mail*, July 10, 1975. This position was reaffirmed by Ontario Premier William Davis on August 15, 1975 who, in an election speech to the annual meeting of the Police Association of Ontario, announced that Ontario would require anyone buying any firearm to have a licence if the Federal Government were to take no action: see the *Globe and Mail*, August 16, 1975.

tect society and in particular the police — and gun control legislation is one of those steps. Exactly the same sequence of events took place in England in 1967 when capital punishment was abolished: the Government introduced gun control legislation prior to the vote on capital punishment.<sup>19</sup>

### III The Need for Change

It is difficult to assess the need for change. There may be a psychological value in reinforcing the security of the citizenry even if no change is warranted by the data, but this will not be relied on in this discussion. Unfortunately, the existing statistics on the use of firearms are inadequate. Statistics Canada did not start collecting data on a regular basis on the use of firearms in connection with crime until 1974. However, there have been useful studies on homicide involving firearms.<sup>20</sup> The analysis here will be confined to homicides and other deaths. It would also be instructive to assess the need for change by looking at robbery statistics, but at the present time these are not available to the writer. It is likely that the robbery data would show that the use of firearms in robbery is increasing, but that the rate of use is still substantially below that in the United States.

Just as the number of murders has been increasing across Canada (from 433 in 1970 to 545 in 1974), so has the number of murders committed with firearms (from 178 in 1970 to 272 in 1974). In 1974 the number of murders with firearms accounted for approximately half of all murders. Of course these figures appear small when compared with the use of guns in the United States where, for example, in Detroit alone in 1968 there were 389 killings and 72% of these were committed with guns.<sup>21</sup> The American figure cannot be completely dismissed as being derived from a foreign country with a different culture: Detroit is just across the river from Canada. We must take care that the conditions which have caused this large

<sup>19</sup> See Greenwood, *Firearms Control* (1972) at pp. 76 *et seq.*

<sup>20</sup> See Statistics Canada, Judicial Division, *Ten-Year Firearm Study 1961-1970*, updated to 1974. See also *Murder Statistics* (catalogue 85-209).

<sup>21</sup> See Zimring, *supra* footnote 11 at p. 148. See generally, Newton and Zimring, *supra* footnote 6. Newton and Zimring estimate (at p. 48) that firearms were used in 65% of homicides in the United States in 1968.



number of deaths with firearms do not occur in Canada. It is apparent from studying the American literature that one of the key factors in the use of guns in the United States is the easy availability of handguns. Let us then turn to the issue of handguns.

Although the number of murders in Canada committed with a handgun is rising (from 33 in 1970 to 71 in 1974), as is the percentage of murders committed with a handgun (from 7.6% in 1970 to 13% in 1974), the handgun murder rate is relatively low. Certainly the Canadian pattern is very different from that in the United States where in 1969 over half of the homicides in major urban areas were committed with handguns.<sup>22</sup>

It is very difficult to tell how many handguns there are in Canada as compared with the United States, but it is probably a fair estimate to conclude that (with about 10 times the population) there are well over 50 times as many handguns in the United States as in Canada.<sup>23</sup> One measure of the number of handguns is the number of new official permits issued each year. In Detroit in 1968 there were 17,760 new official handgun permits issued,<sup>24</sup> whereas in all of Canada in the same year there were only about 14,000 new registrations for handguns.<sup>25</sup> Moreover, it is safe to assume that the number of illegal handguns obtained in that year in Detroit is probably quite high.<sup>26</sup> It should be noted, however, that the number of registered handguns in Canada has been increasing, so that in each of the years 1971, 1972 and 1973 there were over 20,000 more handguns registered.<sup>27</sup>

<sup>22</sup> See Zimring, *ibid.*, at p. 148.

<sup>23</sup> Newton and Zimring estimated (at p. 6) that there were 24,000,000 handguns in the U.S. Exact figures cannot be arrived at because it is not known how many illegal unregistered guns there are in both jurisdictions; nor is it known how many guns purchased in the past are still in existence. Moreover, the official Canadian figures on registration also include the registration of police weapons.

<sup>24</sup> Newton and Zimring, *supra* footnote 6 at p. 70.

<sup>25</sup> *Handguns Registered, 1960-1974*, Firearms Registration Section, R.C.M.P., Ottawa.

<sup>26</sup> See Sherrill, *The Saturday Night Special* (1973) at p. 98, who points out the ease with which a Detroit resident could travel to Toledo, Ohio (only an hour away) and purchase a handgun.

<sup>27</sup> See *Handguns Registered, 1960-1974*, Firearms Registration Section, R.C.M.P., Ottawa. (I have ignored the 1974 figure which shows a large drop in registrations, because the figure is not consistent with the constant number of registrations in Toronto between 1973 and 1974 (conversation with John Millard, Local Registrar of Firearms) and the import figures on handguns.)



Canada's low handgun ownership rate probably accounts for the relatively low rate of homicide by handgun. If handguns are not readily available they will not be readily used, stolen, accidentally discharged, or mistakenly used. Moreover, if the level of ownership of handguns is kept low, then citizens will not feel that they have to acquire handguns in order to feel secure. The possession of handguns may have a multiplier effect on the growth in the rate of their possession. To use another analogy, there may be a "critical mass" stage in the possession of handguns which results in an explosive increase in their possession. These conclusions cannot be proved, but they seem to follow from a comparison between the U.S. and Canadian data. After the most exhaustive analysis yet undertaken of the American data, Professor Franklin Zimring concluded:<sup>28</sup> "It is only when ownership levels are low enough to have an impact on handgun availability that low aggregate ownership will depress handgun involvement in rates of subcultural violence."

Canada is fortunate to have controlled the possession and use of handguns for the past 50 years. The number of handguns is still relatively low. It is important that these controls be maintained — and, it will be argued, increased — so that only a person with a legitimate need may possess a handgun.

Thus far we have been looking at handguns. Should the same conclusions be drawn with respect to long-guns? Again, looking at the homicide figures it can be seen that long-guns play a very significant part in homicides. Almost a third of all homicides in Canada are committed with long-guns. In 1974 out of a total of 545 homicides, there were 186 homicides with long-guns (122 were with rifles and 55 with shotguns; the rest were with sawed-off weapons).<sup>29</sup> Similarly, the number of suicides with firearms (and these would be mainly long-guns) is about a third of all suicides. In 1973, for example, there were 950 suicides with firearms out of a total of 2,773

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<sup>28</sup> At p. 196.

<sup>29</sup> Statistics Canada, Judicial Division, *Ten-Year Firearm Study 1961-1970*, updated to 1974.

suicides.<sup>30</sup> Moreover, in 1973 there were 123 accidental deaths through firearms.<sup>31</sup>

Would controls have prevented a number of these occurrences? Again, the effect of controls cannot be proved, but it seems reasonable to assume that just as the number of handguns will have an effect on crime so will the number of long-guns, although no doubt to a much lesser degree. If a long-gun is readily available it can be used on the spur of the moment to settle a dispute within the family or with a neighbour. Careless storage or handling of long-guns can result in accidents or thefts. Long-guns can be easily cut down and used instead of handguns.

Controls would tend to emphasize that a gun — any type of gun — is a dangerous object and should be handled with care. The Province of Ontario discovered that after it had instituted a hunter safety programme accidental shootings dropped significantly. Controls would tend to make owners feel more responsibility over their use. Controls would also help to convince a person who keeps a long-gun but who does not use it that it would be wiser and simpler to dispose of it in some way.

Thus, some form of control of long-guns appears to be warranted. Moreover, if one wants to have a measure of control over the ammunition for handguns it is necessary to control long-guns and their ammunition because ammunition for handguns and long-guns is often interchangeable. This is one of the reasons why rifles are carefully controlled in England.<sup>32</sup>

#### IV Complexity of the Problem

The control of firearms raises many difficult and complex issues because of the many variables involved. There are different types of firearms, including pistols, revolvers, rifles, shotguns, air pistols, air rifles, fully automatic weapons, semi-automatic weapons, sawed-off weapons, imitation guns, antique guns, and toy guns. There are different types of users,

<sup>30</sup> Statistics Canada, *Causes of Death* (catalogue 84-203).

<sup>31</sup> Statistics Canada, *Causes of Death* (catalogue 84-203).

<sup>32</sup> See the *Report of the Bodkin Committee* of 1934 (Cmd. 4758-1934), cited in Greenwood, *Firearms Control* (1972) at p. 61.



including law enforcement officers, other public officials, persons who wish guns for self-defence, various classes of hunters, target shooters, skeet and trap shooters, tin-can "plinkers", rodent-control users, and various types of collectors. Then there are variables connected with the area in which the gun can be kept or used, such as urban and rural areas, as well as with the status of the user, such as citizens, immigrants and visitors, and with the age and competence of the user. The system devised to cope with these variables will necessarily be a complex one.

### V The Present System of Controls

There are three broad classes of firearms in Canada: prohibited weapons, restricted weapons, and unregulated firearms.<sup>33</sup>

No firearm is now actually prohibited in Canada. The only prohibition set out in the Criminal Code relating to firearms involves silencing devices (s. 82). There is power to prohibit other weapons by "order of the Governor in Council", but as the section is now worded this cannot be applied to any restricted weapon or weapons used for hunting or sporting purposes (para. (c) of the definition of "prohibited weapon"), and as a result it has been used only to ban certain gases such as tear gas and mace and certain devices used in Oriental martial arts.<sup>34</sup> Prior to the 1968-69 amendments, sawed-off shotguns and rifles were absolutely prohibited,<sup>35</sup> but these were transferred to the restricted class in 1968-69.

Restricted firearms now include handguns, fully automatic weapons, and sawed-off long-guns. The maximum penalty for their unlawful possession is two years. The Government by an Order-in-Council can add to this list any weapon "not being a shotgun or rifle of a kind commonly used in Canada for hunting or sporting purposes" and thus far has declared only the

<sup>33</sup> See ss. 82 *et seq.* of the Criminal Code.

<sup>34</sup> Prohibited Weapons Order, P.C. 1974-1051, May 7, 1974, SOR/74-297, *Canada Gazette, Part II*, Vol. 108, No. 10. The prohibiting of the martial arts devices was announced on August 18, 1975 to come into effect on September 8, 1975: *Globe and Mail*, August 19, 1975.

<sup>35</sup> Introduced by Stat. Can. 1951, c. 47, s. 7.

"Commando Mark III" a restricted weapon.<sup>36</sup> The Code, of course, concentrates on the restricted weapon category, requiring registration of all restricted weapons as well as permits for carrying these weapons outside a person's home or place of business.

Unregulated firearms include all other firearms — in particular all shotguns and rifles and all air guns which have a muzzle velocity of 500 feet per second or less.

There are at present a number of methods of regulating restricted firearms.

(a) *Criminal penalties for illegal use.* In common with all firearms, there are sections of the Code attaching a penalty to their improper use. So, for example, it is an offence to possess any firearm "for a purpose dangerous to the public peace or for the purpose of committing an offence" (s. 83),<sup>37</sup> or while attending or on the way to attend a public meeting (s. 84), or to point at another person a firearm, whether loaded or unloaded (s. 86).

(b) *Prohibiting possession of firearms.* Another provision applicable to all firearms is section 95 of the Code, which allows the Court to prohibit any person convicted of an offence involving a firearm from possessing a firearm for up to five years.

(c) *Registration.* All restricted weapons must be registered. This means that the R.C.M.P. Commissioner keeps a central registry of all restricted weapons. (See ss. 98 and 99.) The Commissioner operates through local registrars who, according to the Code, have no authority to refuse registration (unless there is no serial number on a gun). The discretion to refuse registration is in law exercised only by the Commissioner, who "may refuse to issue a registration certificate where he has notice of any matter that may render it desirable in the interests of the safety of other persons that the applicant should not possess a restricted weapon" (s. 99(4)). In practice, however, some local registrars refuse to register an applicant's weapon. Moreover, the techniques of registration

<sup>36</sup> Restricted Weapons Order, P.C. 1974-2186, Oct. 1, 1974, SOR/74-570, *Canada Gazette, Part II*, Vol. 108, No. 20.

<sup>37</sup> The section is actually wider than this and refers to any "weapon or imitation thereof".



also vary across the country; for example, in one city a fee is required.

The mechanics of registration are, in the typical case, as follows. (1) A handgun is selected at a sporting-goods store. (2) The would-be purchaser goes to the local registrar of firearms and applies for a registration certificate and a special permit to bring the gun to the local registrar. (3) The purchaser then goes back to the store with the permit and returns to the local registrar with the gun. (4) The local registrar then causes inquiries to be made into the character of the applicant. The gun is often kept by the registrar during this period. (5) The registration application is then sent to the R.C.M.P. Commissioner with any recommendations from the local registrar. (6) If the Commissioner issues a certificate (after further checks by the R.C.M.P.),<sup>38</sup> the owner of the gun returns to the local registrar to pick up his gun, if the gun has been held there.

Registration certificates are granted to anyone who wishes to have a handgun in his home or business unless, as previously pointed out, the Commissioner knows that it is "desirable in the interests of the safety of other persons that the applicant should not possess a restricted weapon". Subject to this condition a person can keep a handgun at home if he wants it for protection or because he is a collector or is simply starting a collection.

(d) *Permits to carry.* Permits to carry restricted weapons outside the home are much more carefully regulated. (See s. 97.) Here the local registrar (assuming he is the person authorized to perform this function under s. 97(1) of the Code) has a discretion to refuse to issue a permit: the section says "may be issued". No appeal can be taken from a refusal to grant such a permit, although an appeal to a magistrate can be taken if a permit is revoked or if a registration certificate is not granted (s. 99(6)). The registrar will, of course, consider the character of the applicant. The registrar must also be "satis-

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<sup>38</sup> The R.C.M.P. checks on whether he has a criminal record, whether there is an order of prohibition against him, and whether the gun has been stolen: conversation with Staff Sergeant Vern Stables, Head, Firearms Registration Section.

fied'' (s. 97(2) ) that the applicant requires the restricted weapon for one of four stated purposes:

- (a) to protect life or property,
- (b) for use in connection with his lawful profession or occupation,
- (c) for use in target practice under the auspices of a shooting club approved . . . by the Attorney General . . . , or
- (d) for use in target practice in accordance with the conditions attached to the permit.

The practice varies from province to province. For example, some provinces make it very difficult to obtain a permit to carry a handgun ''to protect life or property''; others are less restrictive.

(e) *Permits to sell*. A permit is needed to sell, repair or take in pawn a restricted weapon (s. 96(2) ). Again, discretion is given to the registrar to refuse to issue a permit (ss. 97(4) and 99(3) ) if he ''has notice of any matter that may render it desirable in the interests of the safety of other persons that such a permit should not be issued to the applicant''. In this case, if a permit is refused, an appeal can be taken to a magistrate.

## VI History of Methods of Control

A history of Canada, social, political and economic, could be written based on the history of our gun control legislation. There have been over 100 years of legislation, at first prohibiting certain undesirable conduct, then requiring permits to carry in certain cases and finally requiring registration of handguns.

For the most part, nineteenth-century laws simply attached criminal penalties to unlawful conduct. So, for example, it was an offence for a person to have ''in his custody or possession . . . any offensive weapons for any purpose dangerous to the public peace''<sup>39</sup> or to carry an offensive weapon while engaged in smuggling<sup>40</sup> or when arrested on a warrant or while committing an offence.<sup>41</sup>

A number of these early provisions are interesting in show-

<sup>39</sup> 1892 Code, s. 102. See Stat. Can. 1867, c. 15.

<sup>40</sup> 1892 Code, s. 104.

<sup>41</sup> Introduced by Stat. Can. 1877, c. 30, s. 2; re-enacted in 1892 Code, s. 107.



ing how Canada coped with the activities that take place in the typical Western movie. The law in Canada prohibited the carrying of a firearm while "masked or disguised".<sup>42</sup> Thus, the "Lone Ranger" would have been an outlaw in Canada. Similarly, the Canadian "Dodge City" could have dealt with the bad men riding into town through a provision in the law making it an offence "if two or more persons openly carry offensive weapons in a public place in such a manner and under such circumstances as are calculated to create terror and alarm".<sup>43</sup> In both these cases the penalty was merely a simple fine: in the former between \$10 and \$50; in the latter between \$10 and \$40. But it gave the law enforcement authorities a handle on potential lawbreakers.

Prior to the 1892 Code the only provision which required a person to obtain consent to carry a firearm related to certain areas of the North-West Territories, where it was an offence (with up to six months' imprisonment) for anyone to possess or sell any firearm except a shotgun without the permission of the Lieutenant Governor or a commissioner appointed by him.<sup>44</sup>

A form of control was brought in by the 1877 Improper Use of Firearms Act,<sup>45</sup> which permitted a justice of the peace to bind over for 6 months any person who "has upon his person a pistol or air gun without reasonable cause to fear an assault or other injury to his person or his family or property".

It was in 1892 that the first permit system relating to small arms was introduced. A minor penalty was provided (between \$5 and \$25) for anyone to have a pistol outside his house or place of business without a certificate of exemption who did not have "at the time reasonable cause to fear an assault or other injury to his person, family or property".<sup>46</sup> The certificate was granted by a justice of the peace for up to 12 months

<sup>42</sup> Introduced in the 1892 Code, s. 110.

<sup>43</sup> Introduced by R.S.C. 1886, c. 148, s. 8; re-enacted in 1892 Code, s. 103. Prior to the 1886 Code the provisions were in the pre-Confederation legislation of New Brunswick and Nova Scotia (not the Wild West!).

<sup>44</sup> Introduced by Stat. Can. 1885, c. 51, s. 14; re-enacted in 1892 Code, s. 116.

<sup>45</sup> Stat. Can. 1877, c. 30, s. 1.

<sup>46</sup> 1892 Code, s. 105.

if he was satisfied by evidence upon oath of the "discretion and good character" of the applicant.<sup>47</sup>

This loose permit provision was tightened up in 1913,<sup>48</sup> at which time a permit was required for carrying any small arms — whether or not there was "reasonable cause to fear an assault". The legislation did not affect existing handguns kept in the home or place of business, but proscribed the sale of any handgun to a person who did not have a permit. A permit was to be issued for up to 12 months if the issuer was satisfied of the applicant's "discretion and good character"; and instead of being granted by a justice of the peace, permits were granted by a magistrate or by the police. The penalty was also raised from the relatively insignificant maximum of \$25 found in the 1892 Code to a possible three months' imprisonment.

In each of the years, 1919, 1920, and 1921 the Government brought in amending legislation. The 1920 legislation was extremely far-reaching — indeed, much more restrictive than anything that has been seen since then, except during the Second World War.

The 1919 legislation made it unlawful for any alien to possess any firearm without a permit. The legislation, which was introduced on June 27, 1919, was undoubtedly prompted by the Winnipeg General Strike, which had erupted in violence on June 21, 1919.<sup>49</sup> The debates in the House show a very strong anti-foreign bias.<sup>50</sup>

The Government extended the legislation in the following year, 1920, to require all persons, whether aliens or not, to obtain permits for all guns, including rifles and shotguns. The only exception was that "no British subject shall be required to obtain a permit with respect to any shot gun now owned by

<sup>47</sup> 1892 Code, s. 105. Note that section 105(5) allowed the Government to suspend the operation of the provision in certain areas.

<sup>48</sup> Stat. Can. 1913, c. 13, s. 4.

<sup>49</sup> See generally McNaught and Bercuson, *The Winnipeg Strike: 1919* (1974).

<sup>50</sup> Hansard, House of Commons, July 1, 1919 at pp. 4357 *et seq.* One member stated: "During the last two years, almost all serious crimes of violence, murder and the like, committed in Ontario, have been committed by aliens." Another stated: "Are we to allow these aliens to bring their bad habits, notions and vicious practices into this country?" As it turned out, all the leaders of the Winnipeg Strike were British-born (except one who was born in Ontario): see McNaught, "Political Trials and the Canadian Political Tradition" in Friedland, *Courts and Trials: A Multi-disciplinary Approach* (1975) at p. 149.



him".<sup>51</sup> The purpose of the legislation, according to the statement of the Minister of Justice in the House was "to enable us to obtain knowledge of the trafficking in dangerous firearms, and keep control over persons who have them in their possession".<sup>52</sup> This legislation was probably influenced by the far-reaching U.K. legislation enacted in 1920.<sup>53</sup> No legislation in Canada before or since has gone as far.

The 1920 legislation was short-lived. In 1921 the Government reverted to the 1919 position and required an alien to have a permit for any firearm he possessed, but required British subjects to have permits only for handguns carried outside their home or place of business, or for any handguns subsequently purchased by them. A provision of the Act<sup>54</sup> permitted the Government to require, by means of a proclamation, permits for all guns "for such period" and "in such portion of Canada" as named in the proclamation.

In 1933 the Government again strengthened the permit provisions<sup>55</sup> by increasing the penalty for carrying a handgun outside a person's house or place of business from the previous maximum of 3 months to a maximum of 5 years. In fact the Government wanted to make the provision even stronger by providing a minimum 1-year penalty. (As originally introduced there was a minimum 5-year penalty!)<sup>56</sup> But the Senate would not agree to a minimum penalty in these circumstances and the Commons accepted the Senate's position.<sup>57</sup> Section 122, as enacted by the 1933 Act, included one minimum sentence, a minimum sentence of 2 years in addition

<sup>51</sup> S. 118 of the 1906 Code, as enacted by Stat. Can. 1920, c. 43, s. 2.

<sup>52</sup> Hansard, House of Commons, June 10, 1920, at p. 3411.

<sup>53</sup> See the U.K. Firearms Act, 1920, s. 1(1): "A person shall not purchase, have in his possession, use, or carry any firearm or ammunition unless he holds a certificate (in this Act called a firearm certificate) granted under this section, and in force at the time." This legislation was introduced in the U.K. Parliament on April 19, 1920. See generally, Greenwood, *Firearms Control* (1972) at pp. 45 *et seq.*

The legislation was not influenced by U.S. Federal legislation because until 1927 the only U.S. Federal legislation affecting firearms was a 10% manufacturers' excise tax enacted in 1919: see Zimring, *supra* footnote 11 at pp. 135-6. (The tax aspect explains why enforcement has been in the hands of the U.S. Treasury.) However, State legislation, such as in New York, may have had some impact in Canada.

<sup>54</sup> S. 118(4), as enacted by Stat. Can. 1921, c. 25, s. 2.

<sup>55</sup> Stat. Can. 1933, c. 25.

<sup>56</sup> Hansard, House of Commons, March 29, 1933, p. 3512.

<sup>57</sup> Hansard, House of Commons, April 28, 1933, p. 4397.

to any other sentence if the offender carried a handgun while committing a criminal offence; this was not changed by the Senate.<sup>58</sup>

Another major change brought in by the 1933 Act was to bring sellers of handguns within the permit system. There was considerable doubt as to how far the Federal Government could go in regulating sales.<sup>59</sup> The Minister of Justice stated: "In this bill we have sought to regulate the sale, without actually prohibiting it, and we believe that in the regulations proposed in the bill we are within our constitutional rights".<sup>60</sup>

A third major change was to tighten further the issuing of permits to carry handguns by limiting the circumstances in which the permits could be issued to cases where the person "requires a pistol or revolver for the protection of life or property, or for target practice in a regularly organized shooting club, approved by the Attorney-General of the province".<sup>61</sup> The target practice provision was not included in the Commons Bill, but was inserted by the Senate.<sup>62</sup> In the following year, this legislation was changed to permit a carrying permit "upon sufficient cause being shown". Thus the collectors could add to their collections, and target shooting did not necessarily have to be through an organized shooting club.

These highly restrictive provisions of 1933 were brought in, as Hugh Guthrie, the Minister of Justice, stated in the House,<sup>63</sup> "in response to many requests which have come from municipal bodies, boards of trade and various other societies throughout Canada, asking that more drastic legislation be passed in regard to the use or carrying of pistols and revolvers." It may be that the lack of opposition to the legislation was due to the fact, noted by the Minister of Jus-

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<sup>58</sup> This was extended to long-guns by Stat. Can. 1938, c. 44, s. 7. The section was given a narrow interpretation in *R. v. Quon* (1948), 92 C.C.C. 1 (S.C.C.), the Court holding that it did not apply to a gun used in an armed robbery. The section was repealed by Stat. Can. 1951, c. 47, s. 7.

<sup>59</sup> See Hansard, House of Commons, March 20, 1933, p. 3147 and March 29, 1933, p. 3512.

<sup>60</sup> Hansard, House of Commons, March 29, 1933, p. 3512.

<sup>61</sup> S. 120 as enacted by Stat. Can. 1933, c. 25, s. 1.

<sup>62</sup> See Hansard, House of Commons, April 28, 1933, p. 4397.

<sup>63</sup> Hansard, House of Commons, March 29, 1933, at p. 3512.



tice,<sup>64</sup> “that there is no manufacture in Canada of pistols or revolvers”. No doubt this “drastic” legislation was designed to cope with the rise of gangsterism in North America associated with prohibition and the anti-gambling laws.

The following year, 1934, the Government, perhaps influenced by Roosevelt’s New Deal gun control proposals,<sup>65</sup> brought in a new Bill providing for the registration of all handguns, wherever kept. There was no discretion to refuse registration; the Act provided that the R.C.M.P. or any person authorized by a provincial Attorney-General “shall register all revolvers and pistols in respect of which application for registration is made”.<sup>66</sup> During the Second World War all firearms were registered but these records were destroyed after the war.

A full revision of the Act was made in 1951, and this, with some changes in the 1953 and 1954 Code and other amendments, lasted until the revision of 1968-69. The 1951 legislation set up a single registry system under the Commissioner of the R.C.M.P.<sup>67</sup> (In the 1934 legislation, centralized recording was attempted administratively through co-operative efforts.) It also included for the first time fully automatic weapons within the registration and permit provisions. (The legislation is somewhat confusing because “firearms” are artificially defined as handguns and automatic weapons.) The legislation was in one respect less restrictive in that purchasers of handguns could insist on registration if they kept their guns at home or at their places of business. It was only if a purchaser wished to carry the gun that a permit was needed and in such a case there was apparently a measure of discretion left to the issuer because of the word “may” in the section.<sup>68</sup>

<sup>64</sup> Hansard, House of Commons, March 20, 1933, at p. 3147.

<sup>65</sup> The U.S. National Firearms Act of 1934, which was strongly backed by the U.S. Justice Department, had provided for federal registration of all handguns, but this was deleted in the House of Representatives: see Zimring, *supra* footnote 11 at pp. 137-8. The passage of the Act was expedited by the occurrence of John Dillinger’s escape from jail: see Zimring, *supra* footnote 11 at p. 148.

There was little relevant U.S. Federal legislation of consequence until 1968. The Federal Firearms Act of 1938 (supported by the National Rifle Association) was, according to Zimring, *supra* footnote 11 at p. 140, only “a thin coat of regulation over all firearms and many classes of ammunition suitable for handguns”.

<sup>66</sup> S. 121A of the Code, as enacted by Stat. Can. 1934, c. 47, s. 3.

<sup>67</sup> S. 124, as enacted by s. 7 of Stat. Can. 1951, c. 47.

<sup>68</sup> S. 125, as enacted by s. 7 of Stat. Can. 1951, c. 47.

Finally we come to the most recent revisions in 1968-69.<sup>69</sup> As we have seen, they, in effect, divided firearms into three classes — prohibited weapons, restricted weapons (which had to be registered and which required a permit to carry) and long-arms which were left uncontrolled. They were the result of extensive debate in Parliament and consultation with interested parties. The Bill originally proposed by the Government (Bill C-195, introduced on December 21, 1967) went much further than Bill C-150, which eventually became the law:

### VII Other Options

A number of options are open in the area of gun control, which will each be examined in turn. After a look at the present system of dealing with prohibited and restricted weapons, an examination will be made of the problems connected with the control of long-guns. Then certain control devices common to both handguns and long-guns will be explored.

### VIII Prohibited Weapons

At least two additions to the list of prohibited weapons should be considered: the sawed-off rifle or shotgun and the fully automatic weapon. Sawed-off weapons were formerly illegal under the Code.<sup>70</sup> However, in the 1968-69 amendments they were transferred into the restricted category. Thus the present Code is less restrictive than it formerly was. The main use of the sawed-off gun is in criminal activities. There are said to be other situations where it is convenient to have such a weapon, such as in the case of hunters who wish to kill wounded animals; but if there is a need in these cases, the person could apply for a permit to have a handgun. Moreover, the present law results in the awkward situation whereby the person who saws down a rifle or shotgun is automatically in breach of the law because he does not have a registration cer-

<sup>69</sup> Again, the 1968 U.S. legislation and the events preceding its passage (*e.g.*, the shootings of Robert Kennedy and Martin Luther King) would have played a role in shaping the 1968-69 Canadian legislation. For a description to the background of the 1968 U.S. legislation, see Sherrill, *The Saturday Night Special* (1973); see also Zimring, *supra* footnote 11.

<sup>70</sup> S. 118 of the 1927 Code, as amended by Stat. Can. 1951, c. 47, s. 7; re-enacted in the 1953-54 Code, s. 85(1).



tificate (s. 91), although until he saws it off it is probably not a restricted weapon subject to registration (s. 98). In any event, no one caught with a sawed-off weapon should be able to say in mitigation that he was intending to register it.

Fully automatic weapons should also be brought into the prohibited category because they have no legitimate use by private citizens. They are virtually never used for target shooting and apparently all hunters agree that they should not be used for hunting. At present some local registrars will not grant a permit to carry, and most provinces will not allow automatic weapons to be used for hunting. Their only possible justification is as a collector's item. Is this a defensible reason for having such a weapon? Many persons in Canada now have such collections. But the main problem with the collector class is that it is difficult to allow one collector to add to his collection and at the same time deny another person the right to start a collection. In any event, how many guns make a collection? Apart from the extreme difficulty of separating the true collector from the person who simply wants to have a weapon, the collector category is dangerous because the weapons can be stolen.

There are a number of possibilities here. One is to prohibit all existing automatic weapons with the exception of collections held or acquired by *bona fide* public museums or other similar institutions, perhaps under a licence granted by the Secretary of State. (Such a prohibition should also include such weapons of war as bazookas and mortars which are not now controlled in Canada.) A present holder would then have a number of choices: he could sell his weapons to a museum, or permanently de-activate the weapons (although he would often be reluctant to do this because it would destroy their resale value), or he could sell the weapons to collectors outside Canada (and a reasonable period of time would have to be given to enable him to do this). Another solution — and this is the one adopted by the U.K. Green Paper of 1973 with respect to collections<sup>71</sup> — is to provide that no one can start a collec-

<sup>71</sup> *The Control of Firearms in Great Britain: A Consultative Document*, May, 1973, Cmnd. 5297 at pp. 16-17. This Report, which recommends further tightening of English gun controls, has not yet been implemented: see Hansard, House of Lords, July 1, 1975, vol. 362, cols. 90-1.

tion and no collector would be able to add to his collection in the future. In time, the existing collections will therefore disappear. In either case the Government should be prepared to buy automatic weapons from those who now possess them.

Of course the police and the military should be entitled to possess these prohibited weapons. Section 100 of the Code recognizes this by providing that such a person "is not guilty of an offence under this Act by reason only that he has in his possession a weapon for the purpose of his duties or employment". There appears to be a problem with the way the present Code is drafted because it does not protect a dealer who sells a prohibited weapon to the police. ("Mace" is now a prohibited weapon and is illegal except in the hands of the police, and apparently the police face a theoretical problem in purchasing it.) The easy solution is also to exempt any dealer acting expressly at the request of the police.

### IX Restricted Weapons

The present system appears to be working reasonably well. (In any event, most local registrars think so.) Most police forces conduct a careful examination of the applicant before forwarding a recommendation to the R.C.M.P. for a registration certificate. The R.C.M.P. themselves make a routine check. Moreover, many local registrars tend to make it difficult for a person to obtain a permit to carry a handgun unless he is a *bona fide* target shooter. As previously discussed, the very fact that relatively few handguns are used in crimes in Canada in comparison with their use in the United States is some indication of the effectiveness of the system. The number of handguns in Canada is still relatively low, although it could easily increase under the present law unless the present controls are tightened. It should be noted, as previously pointed out, that there has been an increase in the illegal use of handguns in Canada. Further, the purchase of handguns is increasing and this may pose problems in the future. Because of the danger to society that can result from the widespread proliferation of handguns, it should be the policy of the law to cut down on the possession of handguns that are not clearly necessary. To achieve this objective a number of improvements can



be made in the system. The system should identify legitimate uses of handguns and tie ownership to those uses. Thus, some form of licensing of handgun owners is required.

### **X Combine Permit and Registration Systems for Restricted Weapons into a Licensing System**

At present the registration and permit-to-carry system operate as two separate systems. No doubt this came about for historical reasons. Why should they not be combined into a licensing system? A licence, renewable perhaps yearly (or every second or third year), would specify the use that could be made of the handgun and would also give the information necessary to satisfy the present registration requirements. The licence would set out the conditions under which it was issued and would serve as a registration certificate, a permit to carry in appropriate cases, and an identification document for the purchase of ammunition. The mechanics of the process will be discussed below.

### **XI Reasons for Having a Handgun**

Most of the control on handguns is now exercised when the owner wishes a permit to carry. If he simply wants to keep the handgun at home, the only reason the Commissioner has to refuse to issue a registration certificate is “where he has notice of any matter that may render it desirable in the interests of the safety of other persons that the applicant should not possess a restricted weapon” (s. 99(4) ).

The distinction between having a gun at home and carrying a gun outside may have been justified in the past for historical reasons. In today’s society the distinction is not justified. A person who wishes to possess a handgun should have to give a legitimate reason for being allowed to possess it, whether he wants to carry it or to keep it at home. What are the possible reasons?

(a) *To protect life or property.* This is often the reason that a handgun is wanted at home. But, except in very extreme cases, this should not be a valid reason. Police forces attempt to discourage persons from keeping a gun for self-defence.

The American studies have shown that a gun cannot be effectively so used.<sup>72</sup> Citizens should rely on the police, security guards, and alarm systems for protection. Gunfire is often too much force, and it is too definitive. To attempt to use a gun in self-defence will often bring about disastrous results to the homeowner through retaliation or misuse and will often result in innocent persons being mistakenly shot. The U.K. Green Paper of 1973<sup>73</sup> reaffirms the position that protection of life or property should never be a reason for having a gun. It is possible, however, to envisage unique situations where there might be a legitimate need for a gun for self-defence. Perhaps in these cases the police themselves should supply the gun and should deputize the person as a peace officer for the period in which the danger exists. This would ensure that the use of guns for this purpose is very carefully controlled.

(b) *The use in connection with profession or occupation.* It would appear that permits-to-carry for persons in this category are now fairly carefully controlled. In Ontario, for example, a few hunters and prospectors and others in similar circumstances are granted permits, but for the most part it is difficult to get a permit in these cases. Security guards and others are now given a permit only while they are security guards. For the most part, provinces carefully regulate the occupation of security guards. There is the problem of what happens to a gun purchased by a person (rather than the company) for use in an occupation after the person ceases to hold the position. In such a case there can be no justification for keeping the weapon. The possession of the gun should be tied to the occupation.

(c) *Target shooting.* Handgun target shooting through an approved club would seem to pose few problems. Self-regulation of the membership by the clubs is a good technique for controlling safety and competence and probably, to some extent, for screening the character of those involved. In Ontario, permits-to-carry are applied for by the clubs who normally

<sup>72</sup> See Newton and Zimring, *supra* footnote 6, chapter 10.

<sup>73</sup> *The Control of Firearms in Great Britain*, *supra* footnote 71 at pp. 14-16. The Secretaries of State in Great Britain now give advice to chiefs of police that "personal protection should not be regarded as a good reason for a private person to possess a section 1 firearm. This is a policy which has long been followed by chief officers".

provide public liability insurance coverage for their members as well.

But not all handgun shooters belong to a club or shoot at a club. Should they be permitted to operate outside the club structure? The present permit section of the Code (s. 97(2)(d) ) allows the issuance of a permit outside the scope of shooting clubs. Although there are clubs throughout Canada, there will be some communities where there is no club. In these cases an individual should be entitled to practise target shooting only at a specific range approved by the Attorney-General.

Can a person now target shoot on his own property? It would seem that a pistol range can be established *in* a person's home (if the municipal by-laws permit it) but not outside his home — even if it is on his property; section 93 makes it an offence to have without a permit “a restricted weapon elsewhere than in his dwelling-house or place of business”. A permit should be required wherever handgun shooting takes place. Target practice within a person's home should require a permit, and the range should be approved by the Attorney-General.

In the discussion of the previous categories of user it was suggested that the possession of the gun be tied to the necessity for having it: when the necessity ceased, the person could no longer keep the handgun. This is more difficult in the shooter category because periods of time may go by without the shooter being involved in the sport. On the other hand, one does not want to enable a person to have a handgun for life just because at one time he showed an interest in shooting. Perhaps the solution is to provide that evidence of recent membership in an approved gun club (or an explanation of special circumstances) would be necessary to justify having a handgun as a shooter.

(d) *Collector*. The collector category poses the most difficult problem because, as pointed out in the discussion of the fully automatic weapon, it is very difficult for the authorities to distinguish between the true “collector” and the person who says he is a collector in order to possess a handgun. If we permit persons to build collections, we should also allow



others to start collections. Most persons who now obtain handguns probably belong to this category. This results in the needless proliferation of handguns in society. Even the *bona fide* collector poses a danger because, among other reasons, his collection can be stolen. But most importantly, because it is virtually impossible to distinguish between the *bona fide* collector and others, this category should be eliminated.<sup>74</sup> Again, those who now possess handguns should be entitled to keep them, but no one should be able to start a collection or add to an existing one. This should apply in the future to persons who wish to possess a gun as a souvenir or for sentimental reasons. The collector or anyone else can, of course, possess permanently de-activated guns; this according to the R.C.M.P. is now technically possible without changing their appearance. In time these collections would disappear and be sold to public institutions or to individuals outside the country.

If it is thought desirable to continue the collector classification, then perhaps the best method of control is to require membership in a collectors' club approved by the Attorney-General. The club could, to some extent, sort out who is a *bona fide* collector more easily than could be done by abstract legislation.

Antique guns (as distinguished from replicas) should be exempt from licensing. Because of their value and in many cases the uncertainty of their discharge, it is unlikely that many would find their way into the hands of those who intend to use them for illegal purposes. One simple solution might be to exempt any firearm over 100 years old.<sup>75</sup>

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<sup>74</sup> See generally, the U.K. Green Paper, *supra* footnote 71, at pp. 16-17, where it is recommended that "no new firearm certificate should be granted to enable a collection to be started by a person who does not already hold one, or to enable an existing collector to extend his collection". The Document makes the point that "if a desire to collect firearms is accepted as a good reason to justify the grant of a certificate, then virtually any person who wanted to keep a few weapons could make out a case for having a certificate".

<sup>75</sup> See the U.K. Green Paper, *supra* footnote 71 at pp. 23-4, which demonstrates how complicated an antique firearm test can be. The Document would not classify as an antique firearm any "breach-loading firearm capable of firing, or designed to be capable of firing, a self contained metallic cartridge (*i.e.*, a cartridge consisting of its own case, primer, propellant and bullet)".

The test in the U.S. Gun Control Act of 1968 is that the gun "is unserviceable and is being imported as a curio or museum piece": see Zimring, *supra* footnote 11 at p. 154.

## XII Character of the Applicant for a Handgun

At present most police forces make a thorough check into the background of an applicant and, through the local registrar, report to the Commissioner (who alone may refuse to issue a registration certificate) "any matter that may render it desirable in the interests of the safety of other persons that the applicant should not possess a restricted weapon" (s. 98(3)). No guidance is given in the Code as to how the section should be interpreted. Should previous convictions bar a person from obtaining a handgun? All previous convictions? A history of drunkenness? Mental instability?

No doubt a general test is required and the one set out in the Code is a reasonably good one, but it would be better in certain circumstances if the Code were to put the onus of proof on the applicant<sup>76</sup> to show that he is a suitable person to possess a handgun and that the safety of others would not be endangered. The circumstances where the onus should be reversed should include the following: conviction for any indictable offence involving violence or the threat of violence;<sup>77</sup> commitment to a mental institution;<sup>78</sup> and any conviction involving drug-taking or drunkenness (although not necessarily any conviction involving liquor). In order to do a reasonable check for previous convictions it would be necessary to obtain fingerprints.

An applicant who is refused a licence, whether because of his character or because of his failure to establish a valid reason for wishing the gun, should have a right of appeal.<sup>79</sup> As pointed out above, there is no right of appeal if a permit to carry is not issued, although there is a right of appeal if a per-

<sup>76</sup> This is similar to the proposal with respect to bail in s. 47(3) of Bill C-71, introduced by the Minister of Justice on July 17, 1975, whereby s. 457 of the Code is to be amended to put the onus on the accused in certain circumstances to show cause why his detention in custody is not justified.

<sup>77</sup> The U.K. Green Paper, *supra* footnote 71 at p. 24 proposes that "any person convicted on indictment of any offence involving violence should be prohibited for life from possessing a firearm or ammunition". In the case of persons awaiting trial, it would be wise to apply the reverse onus provision here as well. As for existing guns, this is a matter for the judge on the bail hearing.

<sup>78</sup> Including, as in the U.S. Gun Control Act of 1968, 18 U.S.C. s. 922(d)(3) (1970), "adjudicated mental defectives".

<sup>79</sup> See *Re Purdy* (1974), 20 C.C.C. (2d) 247 (N.W.T.S.C.).

mit is revoked or if a registration certificate is not granted (s. 99(6) ). The present appeal provisions are to a magistrate with a further full hearing at the request of either party in a higher court — in most provinces, the County or District Court. Giving this double right of appeal on the merits in such a case would seem to be unnecessary. A better solution might be to have the initial appeal to the County Court with a further appeal on a question of law to the Court of Appeal. It would be easier to achieve uniform application of the law within the county and, possibly, within the province if such an appeal structure were established.

### **XIII Competency Test for Acquiring a Handgun**

A competency test should be established to ensure that the applicant understands the law and the safety aspects of handguns. But it would be a mistake to expect too much of a competency test. It would not weed out very many persons. There are not a great number of regulations and safety rules to be learned, as there are in hunting. Of course a difficult course of study into such matters as the mechanics of handguns and the study of ballistics could be constructed, but this might only serve to stimulate interest in handguns. One does not need a competency test to act as a barrier to the impulsive purchase of a handgun; the present system already provides these barriers. The Shooting Clubs could be made responsible for conducting these tests, perhaps whether or not the applicant, for example a security guard, wishes to join a club. Alternatively, the police could do the testing. To require an annual competency test would appear to be a form of harassment. It should be no more necessary than taking an annual driving test.

### **XIV The Licence for a Handgun**

After the initial registration procedures, which might not differ from the present procedures, the handgun owner would be given a licence. The licence might operate much the same as a driver's licence. It would be renewed annually (or possibly every two or three years) through the mail with an appropriate fee to cover processing and at least some of the costs of



running the licensing system. The legislation would set out conditions which, if broken, would not necessarily create offences, but would be grounds for revoking the licence or for not issuing a new licence. Conditions would relate to such matters as how the gun and the ammunition are to be stored; for example, the legislation might provide as a condition of obtaining a renewal of the licence that the gun and the ammunition be kept separately and each be securely locked. The licence would also record whether the handgun can be carried outside the home or place of business and, if so, under what circumstances.

The licence would also serve as an identification card for the purchase of ammunition, for supplies for manufacturing ammunition, or for the repair of the gun. Ideally it should contain the applicant's photograph and a full description of the specific gun to which the licence relates.

The advantage of combining the registration certificate with a permit is that control can be exercised over handguns kept in the home. Some control is therefore possible on how they are kept and there is an occasion every year or so to examine whether the person is fit to have a handgun. As a side effect, the periodic licence requirement and the consequential fee may tend to discourage handgun ownership.

## XV Controlling the Type of Handgun

In the United States, legislative steps are being taken to try to control the so-called "Saturday-Night-Specials" — *i.e.*, cheap foreign handguns.<sup>80</sup> One method of control is to raise the cost by insisting on a higher quality construction and a number of special safety features. This is a sensible step: as with cars, there are certain minimum safety features that all guns sold in the future should have. Target shooters would not object to these minimum features. Whether it would significantly raise the price of handguns and thereby decrease the demand is uncertain. The step is justified whether or not it affects the demand.

<sup>80</sup> See Zimring, *supra* footnote 11 at pp. 163 *et seq.*; Sherrill, *The Saturday Night Special* (1973) at pp. 97-117, 298-311. See President Ford's Message to Congress, June 19, 1975: "They are such a threat to domestic tranquillity that we should eliminate their manufacture and sale entirely".

None of these cheap handguns is manufactured in Canada. They have to be imported or smuggled in. If they are imported, the normal controls would operate. Obviously it is the smuggling that may create a problem. Customs men must search for guns as carefully as they now search for narcotics.<sup>81</sup> Zimring discovered<sup>82</sup> that the U.S. Gun Control Act of 1968 has not been working because people bring guns from States with lax gun control laws such as South Carolina into States with restrictive laws such as New York. We must be careful that a similar practice does not take place between the United States and Canada. A minimum sentence is worth considering here. If there is a justification for a minimum sentence for smuggling narcotics into Canada, then there is as strong a case for a minimum sentence for smuggling in shipments of handguns.

### **XVI Long-Guns: Licensing of Owners**

Long-guns are now subject to virtually no control. Yet, as previously pointed out, many more murders in Canada take place with rifles and shotguns than with handguns. In addition, there are a large number of accidents and suicides that take place with long-guns. Controls can be effective. Ontario has shown, for example, that the implementation of a hunter safety programme can significantly reduce the number of accidents. During the first ten years of its operation, hunting accidents declined from 146 to 78 annually.<sup>83</sup>

A new classification should be introduced into the Code in addition to prohibited and restricted weapons: controlled weapons. This would include all rifles, shotguns, and air guns which are not now restricted weapons (*i.e.*, those with a muzzle velocity up to 500 feet per second).

The main control should involve a licensing system in which the applicant would initially have to pass a competency test. Many of the points relating to long-guns have already

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<sup>81</sup> See item 99220-1 of Schedule C of the Customs Tariff Act, R.S.C. 1970, c. C-41. The present *Regulations Respecting the Importation of Offensive Weapons* were established by Order in Council P.C. 1972-2182 (Registration No. SOR/72-283).

<sup>82</sup> *Supra* footnote 11 at p. 183.

<sup>83</sup> Information supplied by the Ontario Ministry of Natural Resources.

been brought out in the discussion of restricted weapons. However, there would be some significant differences. For example, asking why persons wish to buy long-guns is not a crucial control device, as it is with handguns. This would provide no control on their possession. People would say either "hunting" or "shooting" or both and this would be accepted as a legitimate reason.

Should a thorough check be made on the licensee's background before he is first given a licence, as the police now do with respect to handguns? In theory this would be desirable (such a check is now made in England in connection with rifles),<sup>84</sup> although in practice it might prove administratively difficult because of the numbers involved. In any event, some check should be made (both by asking the applicant to fill in the relevant information and through a routine check) and if the authorities discover a serious criminal offence (say, an indictable offence involving violence) or a commitment to a mental institution or convictions involving drunkenness or drugs, then, as in the case of handguns, the onus should be on the applicant to prove that he is a suitable person to have a gun. In order to make the criminal record checks effective and to be able to detect aliases, fingerprints would, of course, be useful. (A partial answer to the obvious concern that this would make gun owners feel like criminals is that many special groups in society, such as the police, security guards and many federal civil servants, are fingerprinted.) The general test applicable to handguns should be applied here: a refusal is justified where the authorities have notice of "any matter that may render it desirable in the interests of the safety of other persons"<sup>85</sup> that the applicant not have a gun. Because longguns are often used for suicides it would seem to be appropriate to amend the section (which should be applicable to handguns as well) so that it reads "in the interests of the safety of the applicant or of other persons".

The competency test might be to qualify the person either as a hunter or as a shooter, or both. The test should vary accord-

<sup>84</sup> See the U.K. Green Paper, *supra* footnote 71, s. 6.

<sup>85</sup> S. 99(4) of the Code.



ing to the type of activity and the type of gun. (An air gun applicant, for example, should not be required to meet the standard of a rifle applicant.) In connection with hunting, the Ontario Government's hunter safety programme appears to be a good model. It applies only to new hunters; production of an old hunting licence is proof of competency. Those under twenty must take a supervised course; others need only pass an examination.<sup>86</sup>

One of the key questions is whether a licence should be required for all persons who now possess long-guns. The problem is that there may now be close to 10,000,000 long-guns in Canada. Many persons will not apply for a licence. One does not want to establish a system which automatically makes a large number of persons guilty of offences, or that requires considerable invasions of privacy in order to license the owners of all long-guns. The best solution is to provide that no one can *purchase* or *use* a controlled firearm or any ammunition without a licence. This will slowly sweep into the licensing system most of those who now have guns.

A consequence of a licensing system is that mail orders could not be filled unless the person took prior steps to satisfy the dealer that he is a licence holder. The licensing system would also control the person who buys a gun on the spur of the moment for an illegal purpose. It is not necessary to have a cooling-off period; the system itself would supply one.

As with handguns, the legislation should provide conditions, including a condition that the gun and ammunition be stored separately and securely.<sup>87</sup>

Another consequence of the system is that dealers in long-arms would have to be licensed and would have to keep records of their sales of guns and ammunition so that the authorities could ensure that sales were not made to persons without licences.

<sup>86</sup> See generally, the Ontario *Hunter's Handbook*, Part I, 1969, revised 1974.

<sup>87</sup> In England, one of the standard conditions is that weapons and ammunition be kept in a secure place except when in actual use: see The U.K. Green Paper, *supra* footnote 71 at p. 4.

## XVII Long-Guns: Registration

One of the key issues in relation to long-guns is whether any form of registration of the guns is desirable.<sup>88</sup> There is merit on both sides of the question. On balance, this writer feels that it is not a step that should be taken on the national level at this time.

We can leave aside the extreme arguments of the "gun lobby". For example, the point is often made that registration would provide a dictator with a list of all those with guns. But, as Robert Sherrill has pointed out,<sup>89</sup> a would-be dictator would be a fool to sort through the registration certificates when he could probably get a much better picture of firearm ownership by seizing the records of the gun lobbyists such as the National Rifle Association in the United States, or, we might add, in Canada, the Shooting Federation of Canada. Similarly, we can disregard the American argument that a citizen has the constitutional "right . . . to keep and bear Arms", which is inapplicable in Canada and would seem to be equally inapplicable in the United States.<sup>90</sup>

Although it may be theoretically desirable, the registration of long-guns would be administratively very difficult and would be costly in terms of the benefits which might accrue. This is not to suggest that the registration of handguns should be abandoned; because of the danger to society of handguns, their relatively small numbers, the need for rigid controls, and the fact that the system is now in operation, registration of handguns should unquestionably be maintained.

Certainly the registration procedure now used for handguns, usually involving three trips to the police station for each new gun, is more than can be justified for long-guns — in terms of the inconvenience to the owner and the cost of registration. Moreover, many — if not most — long-guns do not have a registration number and to put one on would add to the expense of the system.<sup>91</sup>

<sup>88</sup> A case against registration is contained in Greenwood, *Firearms Control* (1972).

<sup>89</sup> See Sherrill, *The Saturday Night Special* (1973) at p. 176.

<sup>90</sup> See generally, Newton and Zimring, *supra* footnote 6, Appendix J, "The Second Amendment and the Right to Bear Arms"; Greenwood, *Firearms Control* (1973), chapter 1.

<sup>91</sup> It would be appropriate to provide, however, that in the future all firearms sold in Canada should have a distinguishing serial number. In the U.S., serial numbers were required in

On the other hand, the full complex registration system which operates with respect to handguns need not necessarily be used for long-guns. The legislation could simply provide that a licensee take his gun to the registrar within a certain period of time after purchasing it. Thus, only one trip would be necessary. Indeed, the registration could be done by a licensed dealer as an agent of the registrar. If the gun did not have a serial number the dealer or registrar could himself make some distinguishing mark on the gun. Although such a system might operate with relative ease in connection with *new* purchases, it could not be done without great difficulty for the existing stock of guns. For the system to be effective, all existing firearms would have to be included and this would be a major undertaking.

Would something less than registration be desirable? The law could require that a licensee provide a full list of all his guns before obtaining a licence and that he inform the licensing authority of any change in his ownership. Dealers could, of course, take the responsibility if they were involved. Because the licensing authority would have a full list of all firearms owned by licensees, a licensee could not as easily transfer a gun to a person without a licence, which would seem to be the main reason for wishing any form of registration. (According to the American figures a large percentage of firearms are sold privately in this way.)<sup>92</sup> Although the administrative problems would not be as great as in the case where the guns were examined and registered, this would still be a major administrative task and it is not clear that the benefits would be substantial.

Another reason for desiring a form of registration is that it would be possible to trace lost guns, but this is not a persuasive reason for adopting the scheme. It might also be possible to trace a gun used in a crime, but this would work effectively only if one adopted full registration. Moreover, it is likely that the ownership of the gun is not a key issue in a

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1958 for all new firearms except the .22 calibre rifle: see Zimring, *supra* footnote 11 at p. 141. It is this exception that will create a problem because a large proportion of the .22 rifles sold in Canada come from the United States.

<sup>92</sup> See Zimring, *supra* footnote 11 at p. 142: "about half of all guns are acquired used in the United States, and more than half of these guns are acquired from private individuals".



large proportion of the crimes involving long-guns. In homicide, for example, the fact of killing would often be admitted and the defence would be on another basis, such as self-defence or provocation. For robberies it is unlikely that in very many cases a gun registered in the name of the robber would be used and left at the scene.

Yet there may be a psychological effect to some form of registration — any form — on the gun owner. If he knows that the licensing authorities have some form of a record of all his firearms he may well be more careful with them than he would otherwise be. This heightened appreciation of his firearms may affect the way they are handled, stored, loaned, and used. Registration of handguns would seem to have this effect on their owners.

On balance, however, it would seem not to be worthwhile to attempt any form of registration of long-guns on a national basis. In a later section it will be suggested that the administration of the long-gun laws be given to the provinces. The Federal legislation could leave the issue of some form of registration open to a province and the experience gained from its implementation in any one province would help determine the benefits of the system.

The real controls will come through the regulation of dealers to make sure they do not sell guns or ammunition (or supplies to make ammunition) to unlicensed persons. A number of forms of control can be used. The dealer would keep a record of all sales, which record would include the licensee's signature for each purchase. If the licence took the form of a typical credit card which could be imprinted on the document, the system would work even better. There may be objections to the inconvenience, but the extra few seconds it would take a hunter to sign a form should not seem like much time in comparison with the hours spent waiting for a duck. These records would be sent periodically to the licensing authority for inspection to make sure that unlicensed persons were not obtaining firearms and ammunition and possibly to see if abnormally large quantities of ammunition or firearms were being purchased by someone who might in turn be selling them privately.

The other control device is through inspectors (undercover and otherwise) who would help make sure that the dealers were operating in a proper manner and could recommend non-renewal of a dealer's licence if there were abuses.

### XVIII Civil Liability

The imposition of civil liability is a technique of control applicable to all firearms which has not been discussed in the literature. Yet it has interesting possibilities. Somewhat surprisingly, the common law makes a gun owner liable only for negligence<sup>93</sup> and, of course, his own illegal or improper use. And unlike an automobile owner,<sup>94</sup> a gun owner has no civil liability imposed on him by legislation for the negligence of others — even if the gun was loaned with his consent. The gun has not been categorized as an inherently dangerous object<sup>95</sup> (even though it obviously is one); such a categorization would make the owner strictly liable for any harm caused, whether or not he was negligent. If a person keeps a tiger in his basement and it escapes without negligence on his part he will be held strictly liable. Why should a gun owner not be strictly liable as well? However, it would probably require legislation to make him so liable — and constitutionally it would seem to be the provinces alone that have the legislative power to so legislate. The advantage in making the owner strictly liable (and this will have particular reference to long-guns) is that it transfers onto the shoulders of the shooter one of the true costs of having a gun. It may be thought by some that absolute liability goes too far and that the owner should not be liable if the gun was stolen from him without fault on his part.

<sup>93</sup> See the line of tort cases involving firearms studied by all first-year law students establishing this: *Weaver v. Ward* (1616), Hob. 134, 80 E.R. 284; *Stanley v. Powell*, [1891] 1 Q.B. 86; *Cook v. Lewis*, [1951] S.C.R. 830. *Cook v. Lewis* did, however, switch the onus of proof onto the defendant in cases not involving automobiles. See generally, Wright, "Civil Liability for Fire-Arms" (1968) 11 *Can. B.J.* 247.

<sup>94</sup> See, e.g., the Ontario Highway Traffic Act, R.S.O. 1970, c. 202, s. 132(1): "The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person . . .".

<sup>95</sup> Although, of course, the dangerous circumstances may make the owner liable for negligence: see, e.g., *Sullivan v. Creed*, [1904] 2 I.R. 317; *Burfitt v. A. and E. Kille*, [1939] 2 K.B. 743.

The legislation, therefore, might provide that the gun owner is liable for any damage he causes through the use of the gun (whether negligent or not), for any damage caused by someone using the gun with his consent, and for any damage caused by someone using the gun stolen from him if he had not stored it in a safe manner. A minor criminal penalty is also worth considering in certain cases, for example, if a gun negligently stored is later used for criminal purposes.

### **XIX Insurance**

Closely allied with the question of civil liability is, of course, the matter of insurance. Just as a car driver needs public liability insurance before he can get a licence, so a gun owner should also be required to obtain it before he can obtain a licence.<sup>96</sup> (The Federal Government could probably constitutionally make this a condition of the licence.) Such insurance is now normally included as part of a homeowner or tenant's insurance policy. No separate charge is made for it there. It can also be obtained through clubs at a very low cost. There is apparently no standard individual policy that one can buy. If civil liability were extended as suggested in the previous section, then the costs would rise and the premium might be specially set apart in a homeowner's policy. Provision would have to be made to provide coverage if insurance could not be obtained — just as in Ontario a sum for public liability is required if the applicant is not insured. Insurance would be one of the costs of keeping a gun, and its yearly cost might discourage persons from keeping guns who have no need for them.

### **XX Minimum Criminal Penalties**

Many persons and groups have advocated minimum penalties for violations of the gun control laws. Some American jurisdictions have enacted such laws.<sup>97</sup> The advantage of a

<sup>96</sup> The legislation would also have to deal with any possible defence of illegality.

<sup>97</sup> See, for example, the Massachusetts law which went into effect on April 1, 1975 and was described as follows by its sponsors: "It imposes a mandatory jail sentence of at least a year and up to five years in prison on anyone unlicensed to carry firearms who is found with a gun of any kind, loaded or unloaded, away from his home or place of business — for example, in a car." the *New York Times*, July 27, 1975.



minimum penalty as a deterrent is obvious. Its disadvantage is that it takes out of the judge's hands the power to shape the sentence to fit the circumstances of the case and the background of the offender. In all other areas the Criminal Code has opted against minimum sentences of imprisonment. The only ones in the Code are murder, where there is a mandatory life sentence (or in certain circumstances a death sentence) and impaired driving where it is only for a second offence that imprisonment is mandatory and the minimum sentence is only 14 days (s. 234). The Narcotic Control Act<sup>98</sup> provides a minimum sentence of seven years for importing or exporting narcotics. However, there is no minimum sentence for the very serious offence of trafficking, even though there is a possible life sentence. "At one time in Canada", states the Le Dain Report,<sup>99</sup> "all narcotic offences were punishable by a minimum mandatory sentence, but this provision was abandoned. Minimum mandatory sentences, while assuring a certain minimum of severity for serious offences, limit the judicial discretion required to deal appropriately with less serious offences." As a result, the Le Dain Commission recommended no change in the law in this respect stating,<sup>100</sup> "In our opinion the Canadian legislation with respect to trafficking in the

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At the federal level there is a mandatory consecutive sentence of from one to ten years for a first offence and from two to twenty-five years for a second offence for federal crimes in which a firearm is used or for federal crimes in which a firearm is carried unlawfully. The Court cannot suspend the sentence in the case of a second offence, as apparently it can do for a first offence: see Zimring, *supra* footnote 11 at p. 157. President Ford has stated in his Message to Congress on June 19, 1975 that "the most effective way to combat the illicit use of handguns by criminals is to provide mandatory prison sentences for anyone who uses a gun in the commission of a crime". "Exceptions to mandatory imprisonment should apply only if the judge finds and specifies in writing one or more of the following: that the defendant was under 18 when the offense was committed, or was mentally impaired, or was acting under substantial duress, or was implicated in a crime actually committed by others and participated in the crime only in a very minor way."

See also the Jamaican legislation of 1974 which provides for an indeterminate sentence upon summary conviction for anyone unlawfully possessing a firearm: see Hickling, "The Jamaican Gun Court Act" (1974) 16 *Malaya Law Review* 248. The constitutional validity of the legislation has recently been upheld by the Privy Council, but the case has not yet been officially reported.

<sup>98</sup> R.S.C. 1970, c. N-1, s. 5(2). There are minimum prison sentences scattered in a few other Acts: see, e.g., the Canada Shipping Act, R.S.C. 1970, c. S-9, s. 235 (loitering near a ship).

<sup>99</sup> *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (1973) at p. 89.

<sup>100</sup> At p. 90.

opiate narcotics would appear to be sufficiently severe to give the law enforcement authorities all the legislative basis they require for effective action.” Moreover, note that the Canadian Committee on Corrections (the Ouimet Committee) stated<sup>101</sup> that “minimum mandatory sentences in cases other than murder constitute an unwarranted restriction on the sentencing discretion of the court.”

In spite of the foregoing, are there any firearms offences which should be made subject to a minimum penalty? Surely not possession of a prohibited weapon (s. 89) or an unregistered restricted weapon (s. 91), because this might sweep into the section such relatively innocent persons as a Second World War veteran who brought back a German Luger but never registered it, or his son to whom he gave it. The very fact that the Code now allows the Crown the option to proceed by indictment *or* summarily shows that Parliament recognizes that some of these offences may not be too serious. The same could be said of most of the other sections of the Code, such as the section dealing with carrying a concealed weapon (s. 85) or the dangerous use of a firearm (s. 86). The gun situation is not sufficiently serious in Canada to warrant such draconian measures. As comfortable as it may be to think so, it is not correct that there is a definite criminal class. There is a wide range of offenders and the distinction between the convicted criminal and the so-called law-abiding citizen is often a very fine one — if not just a matter of chance.

Much can be said, however, in favour of raising some of the maximum penalties in order to show parliamentary concern over the issue of gun control. Moreover, there might be some justification for imposing a minimum sentence for certain *second* firearm offences. And much can be said for a minimum sentence when a firearm is used to facilitate the commission of certain offences — if one could be sure that the circumstances warranted severe treatment. If some form of minimum sentence were thought to be desirable, then, for example, the Code might provide a minimum two-year sentence consecu-

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<sup>101</sup> *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (1969) at p. 210.

tive to any other sentence if the accused had used a firearm in the commission of an indictable offence and was otherwise sentenced to, say, a penitentiary term (that is, two years or more) for that other offence. Such a provision would probably become very widely known and might have a substantial deterrent effect.

The Diefenbaker Bill introduced on February 19, 1975 simply provided:<sup>102</sup> "Every one who carries or has in his possession a firearm for the purpose of or while committing an indictable offence, is guilty of an indictable offence and liable to imprisonment for not less than five years". This is much too broad. It applies to all firearms — not just handguns — and gives the Court no discretion. It would have the effect, for example, of making a hunter convicted of impaired driving<sup>103</sup> while returning to his home with his shotgun in his trunk automatically subject to a minimum five-year penitentiary term!

It should be noted that the present murder sections not only provide a minimum penalty of life imprisonment or death, but the "constructive murder" section of the Code (s. 213) turns any homicide into murder if the accused "uses a weapon or has it upon his person (i) during or at the time he commits or attempts to commit the offence, or (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensues as a consequence". The section is obviously designed to discourage persons from carrying weapons while committing an offence. It is not possible to judge the deterrent effect the section has had. Whatever effect the constructive murder section has had, it could be a more effective deterrent than it now is if it were given more publicity. It is worth emphasizing that there is now in the Code a minimum life sentence (and possibly in certain cases a mandatory death sentence) for anyone who carries a firearm while committing a robbery in which someone is killed — even if the gun goes off by accident and, possibly, even if a bystander is accidentally killed by a police bullet.<sup>104</sup>

<sup>102</sup> Bill C-379.

<sup>103</sup> Even if the Crown proceeded summarily, it is arguable that, being a hybrid offence, it should be treated as an indictable offence: see *R. v. Beaudette* (1957), 118 C.C.C. 295 (Ont. C.A.).

<sup>104</sup> There is no Canadian case on this point, but there are American cases going this far.



### XXI Plea Bargaining

It is often suggested that plea bargaining should not be permitted in connection with firearms offences. (Whether it should be permitted at all — a subject which is being studied by the Law Reform Commission of Canada<sup>105</sup> — is outside the scope of this paper.) The suggestion for a minimum sentence shows a lack of trust in the judiciary; this suggestion shows a lack of trust in the prosecutors. But this lack of trust is mistaken. There is probably very little abuse in the present practices. It is true that in many cases firearms charges are not brought. If the accused, for example, carries a gun during the commission of a robbery, confesses to the robbery and is willing to plead guilty, the prosecutor knows that the carrying of the gun will be taken into account by the judge. There is often no advantage in piling on additional charges. Sometimes, however, the prosecutor feels that there is some tactical advantage in adding additional charges in order to induce the accused to plead guilty to the principal offence: if the accused does agree to plead guilty to the principal charge, then the other offences might be dropped. Again there is no harm to the system. The total sentence will usually be the same whatever is done. As to the situation where the accused is willing to plead guilty to a firearms offence if the principal offence is dropped, one can be reasonably sure that Crown Attorneys would rarely go along with such an arrangement<sup>106</sup> unless they were very unsure of a conviction for the principal offence. Another plea-bargaining situation that one might envisage is when the Crown Attorney, in exchange for a plea of guilty to, say, robbery, fails to mention that the accused possessed a firearm. But again, this will rarely occur because most Crown Attorneys would consider this to be improperly misleading the Court. All in all, no special case can be made to regulate plea bargaining in the firearms situation.

### XXII Other Control Techniques

There are a number of other possible control techniques which should be dealt with. Some can be quickly dismissed.

<sup>105</sup> See Ferguson and Roberts, "Plea Bargaining: Directions for Canadian Reform" (1974) 52 *Can. B. Rev.* 497.

<sup>106</sup> See, e.g., *R. v. Draskovic* (1971), 5 C.C.C. (2d) 186 (Ont. C.A.).

For example, the Government-run depository seems to be a very impractical idea in terms of cost, inconvenience and effectiveness, although much can be said for having voluntary depositories. Similarly, using only Government outlets for the sale of guns and ammunition seems unnecessary if proper supervision can be maintained over private retail outlets. (Some suggest it should be part of a Liquor Control Board Store: "The French guns are very pricey, but we have a lovely Spanish number".)

One concept which should be employed, however, is the amnesty. In the U.K. there have been half a dozen amnesty periods in the past 40 years.<sup>107</sup> An amnesty would allow a person who possesses an unregistered weapon to dispose of it or have it registered without fear of prosecution. It would appear that there has never been a nation-wide amnesty in Canada. (Of course the amnesty would not cover the illegal *use* of the gun, just its illegal possession.)

If the amnesty were coupled with a nominal payment, say, \$10, for each weapon brought in — whether or not an illegal weapon — the amnesty would obviously be more successful. The cost would not be high. In any event, it is cheaper to pay \$10 for a gun and destroy it than it is to register it. It is unlikely that anyone would risk smuggling weapons in from the United States for such a low sum — although this is a possibility to be guarded against.

Another technique which should be explored is the establishing of Government-run long-gun rental depots. It is now very difficult to rent a gun. As a result, those who think they may have use for a gun in the future may be reluctant to dispose of their existing gun.<sup>108</sup>

Finally, the search and seizure provisions of the Code relating to firearms should be re-examined. The search-without-warrant section of the Code (s. 103) only applies if the officer "believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of

<sup>107</sup> See the U.K. Green Paper, *supra* footnote 71 at p. 41.

<sup>108</sup> Further, tranquilizing guns and other non-lethal firearms should continue to be developed to replace to some extent the present lethal weapons: see Newton and Zimring, *supra* footnote 6 at pp. 136-7.

this Act relating to prohibited weapons or restricted weapons''. It should apply to any Criminal Code offence with respect to which the officer has reasonable and probable grounds to believe that a firearm has been used or is about to be used illegally. It is true that there are powers to search without a warrant consequent upon an arrest (s. 450), but an arrest should not be necessary (assuming it is legal) in order to search for firearms.<sup>109</sup>

### XXIII The Federal Government's Role

It would seem that the Federal Government has ample constitutional authority to regulate the use of guns. One would hope that the Supreme Court of Canada would view whatever legislation is brought in by the Federal Government as directly related to the Criminal Law power.<sup>110</sup>

The Federal Government should continue to play the major role in relation to the handgun laws. The rules concerning the granting of handgun licences (or certificates and permits if the present system is maintained) should be clearly spelled out by the Federal Government. One of the problems now is the wide variation in the practices of local registrars across Canada for both certificates and permits. The policy should be clearly enunciated through legislation, regulations, and by means of the R.C.M.P. Firearms Manual. The techniques that may be used in this area do not differ from those applicable to other administrative agencies. As Professor Kenneth Culp Davis points out in his study, *Discretionary Justice*,<sup>111</sup> the police are an administrative agency.

The Federal Government through Statistics Canada should play a more active role in collecting statistics on firearms so that a continuing assessment of the problem can be made. As pointed out earlier, the present statistics are in many respects inadequate. The R.C.M.P. should continue to act as a central

<sup>109</sup> This paper has not explored a number of other areas, such as age limits and the problem of imitation guns. Discussion of these matters can be found in the U.K. Green Paper of 1973, *supra* footnote 71.

<sup>110</sup> I am grateful to Professors Albert Abel and E. R. Alexander for their assistance on the constitutional aspects of this paper.

<sup>111</sup> *Discretionary Justice: A Preliminary Inquiry* (1969) at pp. 222 *et seq.*



registry for handguns and other restricted weapons and to appoint local agents (who will in most cases be provincial officials). The appointment should be a Federal one because the ultimate sanction of replacement if the law is not being properly administered should rest with the R.C.M.P. Should there be special Federal officials to police and prosecute these laws, as in the narcotics area? It would seem that gun control is so closely associated with ordinary police work that the enforcement of the Code in this area, as in most of the rest of the criminal law area, should remain in provincial hands.

Although the enactment of the law and the enunciation of policy in connection with handguns should remain in Federal hands, the same conclusion is not necessarily the right one with respect to long-guns. There is probably provincial legislative power to license long-gun owners, provided the Federal Government does not enter the field and create a conflict. If provincial legislation were felt to be the desirable route, then it would be helpful for the Federal Government to pass enabling laws allowing some form of provincial regulation in the area (as in gambling and abortion) and for the Federal Government to pass laws controlling the interprovincial and international aspects of long-guns. Similarly, as pointed out above, it would appear likely that there is Federal power to legislate in this area if the Federal Government wishes to do so. Either option is open. Perhaps the better alternative is to leave it to the provinces to establish their own rules, within an over-all Federal framework, which can fit the needs of the individual provinces. The regulation of long-guns by the provinces fits in with provincial hunter safety programmes and existing licensing outlets for activities such as hunting, fishing and motor vehicle ownership. It also has the advantage of not linking long-guns too closely with the police, and this will make the law more palatable to long-gun owners. Moreover, if an expansion in civil liability is desirable, this would have to come through provincial legislation.

## XXIV Conclusion

The over-all conclusions of this study are that further steps should be taken to control handguns and that a licensing sys-

tem, without a registration system, should be started for long-guns. The Federal Government should continue to play the major role in enunciating policy in connection with handguns, but it should be left to the provinces, within a federal framework, to develop policies on long-guns.

# The Criminal Act: An Analysis

Robert W. Thompson\*

The purpose of this article is to attempt to reassess *actus reus*, *mens rea*, general intent, specific intent, strict liability and recklessness.

Little purpose would be served in reviewing all the cases on the subject as they are constantly in conflict with one another. The various terms are defined differently by different courts. Rather, an attempt will be made to return to first principles and from these to develop a logical, systematic clarification of concepts.

## 1. PHYSICAL ACT (ACTUS REUS)

The first component of any criminal offence is the act. Every criminal offence either prohibits the doing of an act or makes mandatory the doing of an act. If the act, which is prohibited or made mandatory, does not occur or alternatively does occur then no further inquiries need be undertaken in determining whether the criminal offence has occurred.

Section 295 of the Criminal Code, states:

295. Every one who, without the consent of the owner, takes a motor vehicle or vessel, with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated is guilty of an offence punishable on summary conviction.<sup>1</sup>

*Take the following example:* A sees a motor vehicle and takes it believing that he is taking it without the consent of the owner. Unknown to A, an hour before, he has won that motor vehicle in a raffle. In short, A owned the motor vehicle at the time of the taking of it.

It is submitted that A has not committed an offence under s. 295 of the Criminal Code. He has "not taken the motor vehicle without the consent of the owner." He is the owner.

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<sup>1</sup> R.S.C. 1970, c. C-34.





